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Draft Guide to Enactment of the UNCITRAL Model Legislative Provisions on Cross-Border Insolvency

Note by the Secretariat

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I. PURPOSE OF THIS GUIDE

1. In preparing this Guide to Enactment, the United Nations Commission on International Trade Law (UNCITRAL) was mindful that the *UNCITRAL Model Legislative Provisions on Cross-Border Insolvency* would be a more effective tool for modernizing international aspects of insolvency law if background and explanatory information were provided to executive branches of Governments and legislators using the Model Provisions in preparing the necessary legislative revisions. Such information might assist States also in considering which, if any, of the provisions should be varied in order to be adapted to the particular national circumstances.

2. The present Guide to Enactment was adopted by the Commission [...].

II. BACKGROUND AND PURPOSE OF MODEL PROVISIONS

3. The Model Provisions were adopted to assist States (herein referred to as "enacting States") to formulate a modern, harmonized and fair legislative framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one State or where among the creditors of the debtor there are some that are not from the State where the insolvency proceeding is taking place.

4. The Model Provisions offer an opportunity for States to adopt certain modern, internationally-accepted practices into their law. The Model Provisions represent a universal consensus on certain practices in insolvency matters that are characteristic of modern, efficient insolvency systems, and therefore offer an opportunity for introducing some useful additions and improvements as well as uniformity into the insolvency regimes of the enacting States. Jurisdictions that will find the Model Provisions useful include those that have had to deal with numerous cases of cross-border insolvency as well as those that wish to be well prepared for them.

5. The Model Provisions respect the differences among national procedural laws and do not attempt a substantive unification of insolvency law. They offer solutions that help in several modest, but nonetheless significant ways; those include:

- providing access for the person administering a foreign insolvency proceeding ("foreign representative") to the courts of the enacting State, thereby permitting the foreign representative to petition the courts of the enacting State for a temporary "breathing space", to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

- determining when a foreign insolvency proceeding should be accorded "recognition", and what the consequences of recognition may be;

- providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;

- permitting courts in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;

- authorizing courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;

- providing for court jurisdiction and facilitating coordination in cases of concurrent insolvency proceedings.

6. The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. National insolvency laws have by and large not kept pace with the trend, in that they are often ill-equipped to deal with cases of a cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the insolvent debtor's assets against dissipation and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cases of cross-border insolvency impedes capital flows and is a disincentive to cross-border investment.

7. Only a limited number of countries have a legislative framework for dealing with cross-border insolvency that is well suited to the needs of international trade. Various techniques and notions are employed in the absence of a specific legislative or treaty framework for dealing with cross-border insolvency. Those include: application of the doctrine of comity by courts in common-law jurisdictions; issuance for equivalent purposes of enabling orders (*exequatur*) in civil law jurisdictions; and enforcement of foreign insolvency orders relying on legislation on enforcement of foreign judgments as well as through techniques, such as letters rogatory.

8. Approaches based purely on the doctrine of comity or on the *exequatur* do not provide the same degree of predictability and reliability as would a specific legislative framework for judicial cooperation, recognition of foreign insolvency proceedings and access for foreign representatives to courts. For example, general legislation on reciprocal recognition of judgments, including *exequatur*, might be confined in a given legal system to enforcement of specific money judgments or injunctive orders in two-party disputes, rather than collective insolvency proceedings. Furthermore, recognition of foreign insolvency proceedings might not be considered as a matter of recognizing a "judgment". Recognition might be withheld, for example, if the foreign bankruptcy order is considered to be merely a declaration of status or if it is considered not to be final.

9. To the extent there is a lack of communication and coordination among courts and administrators from concerned jurisdictions, it is more likely that assets would be concealed or dissipated, and possibly liquidated without reference to other possible, more advantageous, solutions. As a result, not only is the ability of creditors to receive payment diminished, but so also

is the possibility of rescuing financially-viable businesses and of saving jobs. By contrast, the presence in national legislation of mechanisms for a coordinated administration of cases of cross-border insolvency makes it possible to adopt solutions that are sensible from the point of view of the legitimate interests of the creditors and the debtor; such mechanisms are therefore perceived as advantageous for foreign investment and trade.

10. The Model Provisions take into account other international efforts. Those include the European Union Convention on Insolvency Proceedings, the European Convention on Certain International Aspects of Bankruptcy ("Istanbul Convention", 1990), the Montevideo Private International Law Treaties of 1889 and 1940, the Convention regarding Bankruptcy between Nordic States (1933) as well as the Havana Convention of 1928 ("Bustamante Code"). Proposals from non-governmental organizations include the Model International Insolvency Cooperation Act (MIICA) as well as the Cross-Border Insolvency Concordat, both developed by Committee J of the Section on Business Law of the International Bar Association (IBA).

III. MAIN FEATURES OF MODEL PROVISIONS

A. Model Provisions fitting into existing national law

11. With a scope limited to procedures for dealing with some aspects of cross-border cases, the Model Provisions are intended to operate as an integral part of existing national insolvency statutes. This is manifested in several ways:

- the amount of possibly new terminology added to existing law by the Model Provisions is limited (e.g. terms specific to the context, such as "foreign proceedings" and "foreign representative"). The terms used are such that they are unlikely to be in conflict with terminology in existing law;

- the Model Provisions present to enacting States the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding in the national law;

- recognition of foreign proceedings does not prevent local creditors from initiating collective insolvency proceedings in the enacting State (art. 22);

- relief available to the foreign representative is subject to the protection of local creditors and other interested persons, including the debtor, against undue prejudice, as well as to compliance with the procedural requirements of the enacting State and to applicable notification requirements (art. 19);

- the Model Provisions retain the possibility of excluding or limiting the effects of recognition on the basis of overriding public policy considerations (art. 6);

- the Model Provisions are in the form of model legislation and possess the flexibility suited for taking into account differing approaches in national insolvency laws and varied propensities of States to cooperate in insolvency matters and to coordinate insolvency proceedings (art. 21).

12. Despite the useful flexibility with which the Model Provisions may be incorporated in the national law, it is useful to bear in mind the desirability of their uniform interpretation, which makes it advisable to limit deviations from the uniform text to the minimum. One advantage of uniformity is that it will make it easier for the enacting States to obtain cooperation from other States in insolvency matters. Thus, the flexibility to adapt the Model Provisions to the legal system of the enacting State should be utilized with due consideration for the need for uniformity and for the benefits to the enacting State in adopting modern, generally acceptable international practices in insolvency matters.

B. Scope of application of Model Provisions

13. The Model Provisions apply in a number of cross-border insolvency situations. Those include: (a) the case of an inward-bound request for recognition of a foreign proceeding; (b) an outward-bound request from a court or administrator in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State; (c) requests for coordination of proceedings taking place concurrently in the enacting State and another State; and (d) participation of foreign creditors in insolvency proceedings taking place in the enacting State (art. 1).

C. Types of foreign proceedings covered

14. A foreign insolvency proceeding, in order to fall within the scope of the Model Provisions, needs to possess certain attributes. These include: basis in insolvency-related law of the originating State; collective representation of creditors; and control or supervision of the assets and affairs of the debtor by a court or another official body (art. 2(a)).

15. Thus, it is intended that a variety of collective proceedings would be capable of recognition, including compulsory or voluntary, corporate or individual, winding-up or reorganization, as well as those in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g. suspension of payments; "debtor in possession").

16. An inclusive approach has been used also as regards the possible types of debtors covered by the Model Provisions. The only exception concerns financial institutions and insurance companies specially regulated under the laws of the enacting State, which are excluded from the scope of application of the Model Provisions (art. 1(2)).

D. Foreign assistance for insolvency proceedings taking place in the enacting State

17. In addition to equipping the courts of the enacting State to deal with incoming requests for recognition, the Model Provisions permit the courts of the enacting State to seek assistance abroad on behalf of proceedings taking place in the enacting State.

18. Addition of the authorization for the courts of the enacting State to seek cooperation abroad may help to fill a gap in legislation in some States. Without such legislative authorization, the courts may, in some legal systems, feel constrained from seeking such assistance abroad. This creates potential obstacles to a coordinated international response in case of cross-border insolvency.

19. The Model Provisions may similarly help an enacting State fill gaps in its legislation as to the "outward" powers of persons appointed to administer insolvency proceedings under the local insolvency law. Article 5 authorizes those persons to act abroad for the purpose of seeking recognition of, and assistance for, those proceedings.

E. Foreign representative's access to courts of the enacting State

20. An important objective of the Model Provisions is to provide for expedited procedures for giving access to foreign representatives to the courts of the enacting State. Such access provides the opportunity for fast action to be taken in the event of a cross-border insolvency. It avoids the need to rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications which might otherwise have to be used. This helps to increase the likelihood of a coordinated, cooperative approach to the case of cross-border insolvency.

21. In addition to establishing the principle of direct court access for the foreign representative, the Model Provisions:

- establish simplified proof requirements for seeking recognition and relief for foreign proceedings, avoiding time-consuming "legalization" requirements involving notarial or consular procedures (art. 13);

- provide that the foreign representative is entitled to commence an insolvency proceeding in the enacting State (if the conditions therefor are otherwise met) and that the foreign representative may participate in an insolvency proceeding in the enacting State (arts. 9 and 10);

- confirm, subject to other requirements of the enacting State, access of foreign creditors to the courts of the enacting State for the purpose of opening in the enacting State an insolvency proceeding or participating in such a proceeding (art. 11).

- give the foreign representative the right to intervene in individual actions in the enacting State affecting the debtor or its assets (art. 20);

- provide that the mere fact of a petition for recognition in the enacting State does not mean that the courts in that State have jurisdiction over the debtor's entire assets and affairs (art. 8).

F. Recognition of foreign proceedings

(a) Determination of whether to recognize a foreign proceeding

22. The Model Provisions establish a test for deciding whether to grant recognition of a foreign proceeding (arts. 13 and 14) and provide that, in appropriate cases, the court may grant interim relief pending a decision on recognition (art. 15). The test involves an assessment of the basis of the jurisdiction of the court from which the foreign proceeding emanates, and includes a determination of whether the jurisdictional link on the basis of which the foreign proceeding was opened was such that it should be considered as a "main" or "non-main" foreign insolvency proceeding.

23. A foreign proceeding is deemed to be the "main" proceeding if the proceeding has been opened in the State where "the debtor has the centre of its main interests". That formulation corresponds to the one found in the European Union Convention on Insolvency Proceedings (art. 3 of that Convention). This allows the Model Provisions to build on the developing harmonization as regards the notion of a "main" proceeding. The determination that a foreign proceeding is "main" may affect the nature of the relief accorded to the foreign representative.

(b) Relief available to a foreign representative

24. A key element of the relief accorded upon recognition of the representative of a foreign "main" proceeding is that of a stay of actions of individual creditors against the debtor or a stay of enforcement proceedings concerning the debtor's assets, and a suspension of the debtor's right to transfer or encumber its assets (art. 16(1)(a) and (b)). Such stay and suspension are "mandatory" in the sense that they either flow automatically from the recognition of a foreign main proceeding or the court is bound to issue the appropriate order. The stay of actions or of enforcement proceedings is necessary to provide a "breathing space" until appropriate measures are taken for reorganization or fair liquidation of the debtor's affairs and assets. The suspension of transfers is necessary because in the modern, globalized economic system it is possible for multi-national debtors to move money and property across boundaries quickly. The mandatory moratorium triggered by the recognition of the foreign main proceeding thus provides a quick "freeze" essential to prevent fraud, protect the legitimate interests of the parties involved until the court has an opportunity to notify all concerned and to assess the situation.

25. Exceptions and limitations to the scope of the stay and suspension are determined by provisions governing comparable stays and suspensions in insolvency proceedings under the laws

of the enacting State (e.g. exceptions for secured claims, payments by the debtor made in the ordinary course of business, set-off, execution of rights *in rem*).

26. In addition to such "mandatory" stay and suspension, the Model Provisions authorize the court to grant "discretionary" relief for the benefit of any proceeding (whether "main" or not) (art. 17). Such discretionary relief, to be granted to the extent the court considers it appropriate, includes, in addition to the stay and suspension, for example, facilitating access to information concerning the debtor's assets and liabilities, preservation and management of those assets, and any other relief that may be available under the laws of the enacting State.

(c) Protection of local interests

27. In order to provide sufficient opportunity for adequate protection of the interests of the creditors (in particular local creditors), the debtor or other affected persons, it is provided, for example, that, when recognition is accorded to a foreign representative, notice thereof must be given as provided by the insolvency law of the enacting State (art. 18); that the court may subject the relief it grants to conditions it considers appropriate (art. 19(2)); and that the court may modify or terminate the relief granted, [including the "mandatory" stay or suspension resulting pursuant to article 16,] if so requested by a person affected thereby (art. 19(3)).

G. Cross-border cooperation

28. A widespread limitation on cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvency derives from the lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authority, for pursuing cooperation with foreign courts.

29. Experience has shown that, irrespective of the discretion courts may traditionally enjoy in a State, the passage of a specific legislative framework is useful for promoting international cooperation in cross-border cases. Accordingly, the Model Provisions fill the gap found in many national laws by expressly empowering courts to extend cooperation in the areas governed by the Model Provisions (art. 21).

30. For similar reasons, provisions are included authorizing cooperation between a court in the enacting State and a foreign representative, and between a person administering the insolvency proceeding in the enacting State and a foreign court or a foreign representative (art. 21).

31. To assist end-users of the Model Provisions, space is left for listing additional forms of cooperation. It is advisable to keep the list illustrative rather than exhaustive so as not to stymie the ability of courts to fashion remedies in keeping with specific circumstances.

H. Concurrent proceedings

32. The Model Provisions provide an opportunity for the enacting State to include in its insolvency law a clear statement of the effect that recognition of a foreign proceeding would have on the jurisdiction of the courts in the enacting State to commence or continue insolvency proceedings. The Model Provisions state that, even after recognition of a foreign "main" proceeding, jurisdiction remains with the courts of the enacting State to institute an insolvency proceeding if the debtor has assets in the enacting State (art. 22). If the enacting State would wish to restrict its jurisdiction to cases where the debtor has not only assets but an establishment in the enacting State, the adoption of such a restriction would not be contrary to the policy underlying the Model Provisions.

33. In addition, the Model Provisions deem the recognized foreign proceeding to constitute proof that the debtor is insolvent for the purposes of commencing local proceedings. This rule may be helpful in those legal systems in which commencement of insolvency proceedings requires proof that the debtor is in fact insolvent. Avoidance of repeated proof of financial failure reduces the likelihood that a debtor may delay proceedings long enough to conceal or carry away assets.

34. Another rule designed to enhance coordination of concurrent proceedings is the one on rate of payment of creditors (art. 23). It provides that a creditor, by claiming in more than one proceeding, does not receive more than the proportion of payment that is obtained by other creditors of the same class.

IV. ARTICLE-BY-ARTICLE REMARKS

Title

35. The title uses the term "insolvency". In some jurisdictions the term has a narrow technical meaning in that it may refer, for example, only to collective proceedings involving a company or a similar legal person, or only to collective proceedings against a natural person; in those jurisdictions, another term, such as "bankruptcy" may be used to refer to proceedings other than "insolvency" proceedings. No such distinction is intended to be drawn by the use of the term "insolvency" in the Model Provisions, since these Provisions are designed to be applicable to proceedings regardless of whether they involve a natural or legal person as the debtor.

36. Upon enactment, it may have to be considered whether the title of the Model Provisions, as incorporated into the national insolvency law, should be adapted to the terminology used in the local law. At the same time, it is desirable when referring to foreign proceedings to utilize terminology consistent with the substance of article 2(a) so as to provide for the broadest possible recognition of foreign proceedings. Perhaps it would suffice to entitle the section in the national law enacting the Model Provisions along the lines of "cross-border proceedings" or

"foreign proceedings". This would avoid utilizing terms such as "insolvency" or "bankruptcy", which may, for the present purposes, have too narrow a technical meaning in some legal systems.

Preamble

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

(b) greater legal certainty for trade and investment;

(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) protection and maximization of the value of the debtor's assets; and

(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

37. The Preamble gives a succinct statement of the basic policy objectives of the Model Provisions. It is not intended to create substantive rights, but rather to give a general orientation for users of the Model Provisions as well as to assist in the interpretation of the Model Provisions.

38. In States where it is not customary to set out preambular statements of policy in legislation, consideration might be given to including the statement of objectives either in the body of the statute or in a separate document, so as to preserve a useful tool for the interpretation of the law.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

(1) This [Law] [Section] applies where:

(a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) assistance is sought in a foreign State in connection with a proceeding in this State under [identify laws of the enacting State relating to insolvency]; or

(c) a foreign proceeding and a proceeding in this State under [identify laws of the enacting State relating to insolvency] in respect of the same debtor are taking place concurrently; or

(d) creditors or other interested parties in a foreign State have an interest in requesting the commencement of or participating in a proceeding in this State under [identify laws of the enacting State relating to insolvency].

(2) This [Law][Section] does not apply where the debtor is a [insert the designations of specially regulated financial services institutions such as banks and insurance companies], if the debtor's insolvency in this State is subject to special regulation.

39. The words "[Law][Section]" are used in article 1 to emphasize that in many instances the Model Provisions would be enacted as an additional "section" in the existing insolvency law. However, throughout the remainder of the Model Provisions only the word "Law" is used.

40. The expression "this State" is used in the preamble and throughout the Model Provisions to refer to the State that is enacting the text. The national statute may use another expression that is customarily used for that purpose.

41. "Assistance" in paragraph (1)(a) and (b) is meant to cover various situations, dealt with in the Model Provisions, in which a court or an insolvency administrator may make a cross-border request directed to a court or an insolvency administrator for a measure to be taken as envisaged in the Model Provisions. Some of those measures are specifically mentioned in the Model Provisions, while others are covered by a broader formulation such as the one in article 17(1)(f).

42. [Paragraph (2): reasons for excluding financial institutions from the Model Provisions.]

Article 2. <u>Definitions</u>

For the purposes of this Law:

(a) "foreign proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) "foreign main proceeding" means a proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "foreign non-main proceeding" means a proceeding taking place in the State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

(d) "foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(e) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(f) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

43. Since the Model Provisions will be embedded in the national insolvency law, article 2 only needs to define the terms specific to cross-border scenarios. Thus, the Model Provisions contain definitions of the terms "foreign proceeding" and "foreign representative", but not of the person or body that may be entrusted with the administration of the debtor's assets in an insolvency proceeding in the enacting State. To the extent that it would be necessary to define in the national statute the term used for such a person or body, this may be added to the legislation enacting the Model Provisions.

44. The definitions used in the Model Provisions, when they refer to proceedings or persons emanating from foreign jurisdictions, are phrased in "functional" rather than in specific technical terms that may be utilized in one or the other jurisdiction. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition, and to avoid unnecessary conflict with terminology used in the laws of the enacting State (see also above, para. 11). As noted above in paragraph 35, the term "insolvency" is an example of a term that may have a technical meaning in some legal systems, but which is intended here (subparagraph (a)) to refer broadly to companies in severe financial distress.

45. The definition of the term "establishment" (subparagraph (f)) has been modelled on article 2(h) of the European Union Convention on Insolvency Proceedings. The use of this term and its definition is advisable so as to contribute to the harmonization of terminology; nevertheless, the enacting State might decide to use some other term or definition if it is commonly used in the State to refer to this type of "business presence".

Article 3. <u>International obligations of this State</u>

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

46. In incorporating article 3, to the extent that is considered useful by the enacting State, it may be noted that the exception for international obligations is meant to refer to obligations at

the inter-governmental level, and not to mere commercial agreements concluded by entities of the State.

Article 4. Competent authority[a]

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by *[specify the court, courts or authority competent to perform those functions in the enacting State]*.

"[a] A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

"Nothing in this Law affects the provisions in force in this State governing the authority of *[insert the designation of the government-appointed person or body]*."."

47. If in the enacting State any of the functions mentioned in article 4 are performed by an authority other than a court, the State would insert in article 4 and in other appropriate places in the enacting legislation the name of the competent authority.

48. The competence for the various judicial functions dealt with in the Model Provisions may lie with different courts in the enacting State, and the enacting State would tailor the text of the article to its own system of court competence. The value of article 4, as enacted in a given State, would be to increase the transparency and ease of use of the insolvency legislation for the benefit of, in particular, foreign representatives and foreign courts.

49. It is important to note that, in defining jurisdiction in matters mentioned in article 4, the implementing legislation should not unnecessarily limit the jurisdiction of other courts in the enacting State, in particular to entertain requests by foreign representatives for provisional relief.

50. In a number of States, insolvency legislation has entrusted certain tasks relating to the supervision of the insolvency process to government-appointed officials. The scope and nature of their duties, which vary widely from State to State, may include, for example: [...]. It is not the purpose of the Model Provisions to interfere with the authority of such officials, a point that some enacting States may wish to clarify in the law, as indicated in the footnote.

Article 5. Authorization of *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* to act in a foreign State

A *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* is authorized to act in a foreign State on behalf of a proceeding in this State under *[identify laws of the enacting State relating to insolvency]*, as permitted by the applicable foreign law.

51. The intent of article 5 is to equip administrators or other authorities appointed in insolvency proceedings commenced in the enacting State to act abroad as foreign representatives of those proceedings. The lack of such authorization in some States has proved to be an obstacle to effective international cooperation in cross-border cases. An enacting State in which administrators are already equipped to act as foreign representatives may decide to forgo inclusion of article 5.

52. It may be noted that article 5 is formulated to make it clear that the scope of the power exercised abroad by the administrator would depend upon the foreign law and courts. Actions that the administrator appointed in the enacting State may wish to take in a foreign country will be actions of the type that are dealt with in the Model Provisions, but the authority to act in a foreign country does not depend on whether that country has enacted legislation based on the Model Provisions.

Article 6. Public policy exceptions

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

53. As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted. With a view to achieving the objectives of the Model Provisions, it is desirable not to encourage resort to the public policy exception provided in article 6. Accordingly, article 6 should be enacted in at least as limited a formulation as that contained in the Model Provisions.

CHAPTER II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE

Article 7. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

54. The article is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, thus freeing the representative from having to meet formal requirements such as licences or consular actions. Notably, the article does not deal with the allocation of competence of the courts in the enacting State for providing relief to the foreign representative.

Article 8. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

55. The limitation on jurisdiction over the foreign representative embodied in article 8 is not absolute. It is only intended to shield the foreign representative to the extent necessary to make court access a meaningful proposition. It does so by providing that an appearance in the courts of the enacting State for the purpose of requesting recognition would not expose the entire estate under the supervision of the foreign representative to the jurisdiction of those courts. Other possible grounds for jurisdiction under the laws of the enacting State are not affected.

56. The article may appear superfluous in States where the rules on jurisdiction do not allow a court to assume jurisdiction over a person making an application to the court on the sole ground of the applicant's appearance. Nevertheless, also in those States it would be useful to enact the article so as to eliminate the concern of foreign representatives or creditors over the possibility of all-embracing jurisdiction triggered by an application for relief.

Article 9. Application by a foreign representative to commence a proceeding under *[identify laws of the enacting State relating to insolvency]*

[Upon recognition,] a foreign representative may apply to commence a proceeding in this State under *[identify laws of the enacting State relating to insolvency]* if the conditions for commencing such a proceeding under the law of this State are otherwise met.

57. In national laws that, in enumerating persons who may request the commencement of an insolvency proceeding, do not mention a representative of a foreign insolvency proceeding, it might be doubtful whether such a representative has standing for making the request. Article 9 is designed to ensure that the foreign representative [subject to recognition of the foreign proceeding] has standing for requesting the opening of an insolvency proceeding. However, the article does not modify the conditions under which an insolvency proceeding may be commenced in the enacting State.

Article 10. Participation of a foreign representative in a proceeding under *[identify laws of the enacting State relating to insolvency]*

Upon recognition of a foreign proceeding, the foreign representative may participate in a proceeding concerning the debtor in this State under *[identify laws of the enacting State relating to insolvency]*.

58. The purpose of the provision is to ensure that, in the insolvency proceeding concerning the debtor, the foreign representative will be given standing to make petitions, requests or submissions concerning issues, such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding. Notably, the provision does not vest the foreign representative with any specific powers or rights. The provision does not specify the kinds of motions the foreign representative might make and does not affect the provisions in the insolvency law of the enacting State that govern the fate of the motions.

59. If the law of the enacting State uses a term other than "participate" (e.g. "intervene") to express the concept, such other term may be used in enacting the provision. It should be noted, however, that the expression "intervene", as used in article 20, covers a case where the foreign representative takes part in an individual action by or against the debtor (as opposed to a collective insolvency proceeding).

Article 11. Access of foreign creditors to a proceeding under *[identify laws of the enacting State relating to insolvency]*

(1) Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding in this State under *[identify laws of the enacting State relating to insolvency]* as creditors in this State.

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]*, except that the claims of foreign creditors shall not be ranked lower than *[identify the class of unsecured non-preference claims, while providing that a foreign claim is to be ranked lower than the unsecured non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the unsecured non-preference claims]*.[b]

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[b] **The enacting State may wish to consider the following alternative wording to replace article 11 (2):**

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]* and the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than *[identify the class of unsecured non-preference claims, while providing that a foreign claim is to be ranked lower than the unsecured non-preference claims if an equivalent local claim (e.g. claim*

for a penalty or deferred-payment claim) has a rank lower than the unsecured non-preference claims].

60. With the exception contained in paragraph (2), the article embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such proceeding, should not be treated worse than local creditors.

61. Paragraph (2) makes it clear that the principle of non-discrimination embodied in paragraph (1) leaves intact the provisions on the ranking of claims in insolvency proceedings, including any provisions that might assign a special ranking to claims of foreign creditors. However, lest the non-discrimination principle should be emptied of its meaning by provisions giving the lowest ranking to foreign claims, paragraph (2) establishes the minimum ranking for claims of foreign creditors: the rank of general unsecured claims. The exception to that minimum ranking is provided for the cases where the claim in question, if it were of a domestic creditor, would be ranked lower than general unsecured claims (such low-rank claims may be, for instance, those of a State authority for financial penalties or fines or claims whose payment is deferred because of a special relationship between the debtor and the creditor). Those special claims will receive the rank below the general unsecured claims, as provided in the law of the enacting State.

62. The alternative provision in the footnote differs from the provision in the text only in that it allows discrimination against foreign tax and social security claims.

Article 12. Notification to foreign creditors of a proceeding under *[identify laws of the enacting State relating to insolvency]*

(1) Whenever under *[identify laws of the enacting State relating to insolvency]* notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have an address in this State. [The court may order that appropriate steps be taken with a view to notifying any creditors whose address is not yet known.]

(2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate.

(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

(a) indicate a reasonable time period for filing claims and specify the place for filing of claims;

(b) indicate whether secured creditors need to file their secured claims; and

(c) contain any other information required to be included in notifications to creditors pursuant to the law of this State and the orders of the court.

63. The main purpose of notifying foreign creditors as provided in paragraph (1) is to inform them of the commencement of the insolvency proceeding and of the time limit to file their claims. However, since in many cases the deadline for filing claims is not established in the notification issued upon the commencement of the proceeding, and since crucial information may be conveyed in subsequent notifications to creditors, it is necessary to require, as it is done in paragraph (1), that foreign creditors be notified whenever notification is required for creditors in the enacting State.

64. In some legal systems a secured creditor who files a claim in the insolvency proceeding is deemed to have waived the security or some of the privileges attached to the credit. Where such a situation may arise, it would be appropriate for the enacting State to include in paragraph (3) a requirement that the notification should include information regarding the effects of filing secured claims.

65. As to the form of the notification to be given to foreign creditors, States have different provisions or practices (e.g. publication in the official gazette or in local newspapers, individual notices, affixing notices within the court premises or a combination of any such procedures). If the form of notification were to be left to national law, foreign creditors would be in a less advantageous situation than local creditors, since they typically do not have direct access to local publications. For that reason, paragraph (2) as a matter of principle requires individual notification for foreign creditors, but nevertheless leaves discretion to the court to decide otherwise (e.g. if individual notice would entail excessive cost or would not seem feasible under the circumstances).

CHAPTER III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 13. Recognition of a foreign proceeding and of a foreign representative

(1) A foreign representative may apply to the competent court for recognition of the foreign proceeding and of the foreign representative's appointment.

(2) An application for recognition shall be accompanied by:

(a) the duly authenticated decision [or decisions] commencing the foreign proceeding and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) Subject to article 14, the foreign proceeding shall be recognized:

(a) as a foreign main proceeding if the foreign court has jurisdiction based on the centre of the debtor's main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.

(4) Absent proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is deemed to be the centre of the debtor's main interests.

(5) If the decision or certificate referred to in paragraph (2) of this article indicates that the foreign proceeding is a proceeding as defined in article 2(a) and that the foreign representative has been appointed within the meaning of article 2(d), the court is entitled to so presume.

(6) No legalization of documents supplied in support of the application for recognition or other similar formality is required.

(7) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

(8) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

66. The article defines the core procedural requirement for an application by a foreign representative for recognition. In incorporating the provision into national law, it is particularly desirable not to encumber the process with additional documentary requirements beyond those referred to.

67. The requirement, in paragraph (2)(a), that the decision commencing the foreign proceeding must be duly "authenticated" means that the copy of the court order or decision commencing or confirming the commencement of the foreign proceeding must bear a clause, seal or other mark that is normally used to attest that the document is a true copy and that it originates from the stated source. Apart from that, as stated in paragraph (6), the document need not be "legalized", i.e. need not be presented to the authorities (e.g. consular agents) that are competent for inspecting and appropriately marking certain types of documents to be used outside their country of origin. Again, one important reason to avoid unnecessary formalities is the need for speed to secure assets and reduce the likelihood of the assets being concealed.

68. The basic distinction is drawn in paragraph (3) between foreign proceedings categorized as "main" proceedings, and those foreign proceedings that are not so characterized, depending upon the jurisdictional basis of the foreign proceeding. The relief flowing from recognition may depend upon the category into which a foreign proceeding falls. For example, recognition of a foreign "main" proceeding triggers a stay of individual creditor actions against assets.

69. It is not advisable to include several criteria for qualifying a foreign proceeding as a "main" proceeding and provide that on the basis of any of those criteria a proceeding could be

deemed a main proceeding. Such a "multiple criteria" approach would raise the risk of competing claims from foreign proceedings for recognition as the main proceeding.

Article 14. Grounds for refusing recognition

[Subject to article 6,] recognition of a foreign proceeding and of the appointment of the foreign representative may be refused only where:

(a) the foreign proceeding is not a proceeding as defined in article 2(a) or the foreign representative has not been appointed within the meaning of article 2(d); or

(b) ... [1]

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[1] Subparagraph (b) would be the appropriate location for including any additional ground for refusing to recognize a foreign proceeding, should the Commission so decide.

70. [To be drafted in light of the decision of the Commission on the content of the article.]

Article 15. Relief upon application for recognition of a foreign proceeding

(1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where necessary to protect the assets of the debtor or the interests of the creditors, grant any relief mentioned in article 17.

(2) *[Insert provisions (or refer to provisions in force in the enacting State) relating to notice].*

(3) Unless extended under article 17(1)(c), the relief granted under this article terminates when the application for recognition is decided upon.

(4) The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

71. Article 15 deals with relief that may be ordered at the discretion of the court (similarly as relief under article 17) and is available as of the moment of the application for recognition (unlike relief under article 17, which is available upon recognition).

72. Relief available under article 15 is provisional in that, as provided in paragraph (3), the relief terminates when the application for recognition is decided upon; however, the court is given the opportunity to extend the measure, as provided in article 17(1)(c), which the court

might wish to do, for example, to avoid a hiatus between the provisional measure issued before recognition and the measure issued after recognition.

73. It is useful to allow under article 15(1) all relief that might be allowed under article 17, since, to the extent such relief is needed, the need typically exists equally before and after recognition.

74. Relief under article 15 is not made subject to exceptions or limitations applicable under the law of the enacting State, as is provided in article 16(2). The reason is that relief under article 15 (as well as article 17) is discretionary and there is, therefore, no need to make the issuance of the discretionary relief subject to exceptions and limitations contained in the law of the enacting State.

75. Laws of many States contain requirements for notice to be given (either by the insolvency administrator upon the order of the court or by the court itself) when relief of the type mentioned in article 15 is granted. Paragraph (2) is the location where the enacting State should make appropriate provision for such notice.

Article 16. Effects of recognition of a foreign main proceeding

(1) Upon recognition of a foreign main proceeding,

(a) the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities are stayed;

(b) the right to transfer, dispose of or encumber any assets of the debtor are suspended.

(2) The scope of the stay and suspension referred to in paragraph (1) of this article is subject to *[refer to any exceptions or limitations that are applicable under laws of the enacting State relating to insolvency]*.

(3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings, to the extent this is necessary to preserve a claim against the debtor.

(4) Paragraph (1) of this article does not affect the right to request the commencement of a proceeding under *[identify laws of the enacting State relating to insolvency]* or the right to file claims in such a proceeding.

[(5) This article does not apply if, at the time of application for recognition, a proceeding is pending concerning the debtor under *[identify laws of the enacting State relating to insolvency]*.]

76. While relief under articles 15 and 17 is discretionary, the effects provided by article 16(1) are not, i.e. they either flow automatically from recognition of the foreign main proceeding or, if

an appropriate court order is needed for those effects to become operative, the court must issue the order. Notwithstanding the "mandatory" nature of the relief under article 16, its scope depends on exceptions or limitations that may exist in the law of the enacting State (e.g. as regards the enforcement of claims by secured creditors, payments by the debtor in the ordinary course of business, or completion of open financial-market transactions). Another difference between relief under articles 15 and 17 and the effects under article 16 is that the relief under articles 15 and 17 may be issued in favour of main as well as non-main proceedings, while the effects of article 16 apply only to main proceedings.

77. Paragraph (1)(a) refers to both "individual actions" and "individual proceedings" in order to cover, in addition to "actions" by creditors in a court against the debtor or its assets, also enforcement measures initiated by creditors outside judicial proceedings, measures that creditors are allowed to take under certain conditions in some States.

78. It would not be feasible for the Model Provisions to deal with sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under paragraph 16(1)(b). The sanctions vary in legal systems, and might include criminal sanctions, penalties and fines, or the acts themselves might be void or capable of being set aside. It should be noted that, from the viewpoint of creditors, the main purpose of such sanctions is to facilitate recovery for the insolvency proceeding of any assets improperly transferred by the debtor and that, for that purpose, the avoidance of such transactions is preferable to the imposition of criminal or administrative sanctions on the debtor.

79. Article 16 does not address the effect of the stay pursuant to paragraph (1)(a) on the running of the limitation period for claims or individual court actions. With a view to avoiding adverse effects to creditors affected by the stay under paragraph (1)(a), paragraph (3) authorizes the commencement of individual actions but only to the extent necessary to preserve claims against the debtor. Once the claim has been preserved, the action continues to be covered by the stay. If in the enacting State it is provided that the stay of the kind envisaged in paragraph (1)(a) triggers the interruption of the running of limitation periods, the enacting State may decide not to enact paragraph (3).

Article 17. Relief that may be granted upon recognition of a foreign proceeding

(1) Upon recognition of a foreign main or non-main proceeding, where necessary to protect the assets of the debtor or the interests of creditors, the court may, at the request of the foreign representative, grant any appropriate relief including:

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under article 16(1)(a);

(b) suspending the right to transfer, dispose of or encumber any assets of the debtor to the extent they have not been suspended under article 16(1)(b);

(a) extending relief granted under article 15;

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration and realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) granting any additional relief that may be available to *[insert the title of a person or body administering a liquidation or reorganization under the law of the enacting State]* under the laws of this State.

(2) Upon recognition of a foreign main or non-main proceeding, the court may entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

(3) In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative or concerns information required in that foreign non-main proceeding.

80. Relief envisaged by article 17 may be granted upon recognition of the foreign proceeding (unlike relief under article 15, which is available upon application for recognition).

81. Relief under article 17 is discretionary, as is the case with relief under article 15. This makes it possible to tailor the relief to the needs of the case. One particular factor to be taken into account in adapting relief to the circumstances of the case is whether the relief is for a foreign main or non-main proceeding. The interests and the authority of a representative of a foreign non-main proceeding are typically narrower than the interests and the authority of a representative of a foreign main proceeding, who normally seeks to gain control over all assets

of the insolvent debtor. Paragraph (3) emphasizes that point by providing a binding guideline to be observed by the court when it grants relief in favour of a foreign non-main proceeding.

82. The explanation relating to the use of the expressions "individual actions" and "individual proceedings" in article 16(1)(a) applies also to article 17(1)(a).

83. As to the "turnover" of assets to the foreign representative (or another person), as envisaged in paragraph (2), it should be noted that the Model Provisions contain several safeguards designed to ensure the protection of local interests, such as: the general statement of the principle of protection of local interests in article 19(1); the notice provision in article 18 and the related possibility that the court delays the turnover of assets until it is assured that the local creditors have either been paid or that their interests will be protected in the foreign proceeding; and article 19(2), according to which the court may subject the relief it grants to conditions it considers appropriate.

Article 18. Notice of recognition and relief granted upon recognition

Notice of recognition of a foreign proceeding [and of the effects of recognition of a foreign main proceeding under article 16] shall be given in accordance with *[the procedural rules governing notice of [the commencement of] a proceeding under the insolvency laws of this State]*.

84. The notice requirement, provided in the interest of local creditors and other interested local persons, does not describe in detail the kind of information to be provided in the notice. If the court considers it necessary that particular information be included in the notice (e.g. about the stay and suspension pursuant to article 16 or the relief granted under article 17), the court may give an appropriate order to the foreign representative, as a condition for granting relief, pursuant to article 19(2).

Article 19. Protection of creditors and other interested persons

(1) In granting or denying relief under article 15 or 17, and in modifying or terminating relief under this article, the court [shall take into account the interests of the creditors and other interested persons, including the debtor] [must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected].

(2) The court may subject such relief to conditions it considers appropriate.

(3) Upon request of a person or entity affected by relief granted under article 15 or 17, [or by the stay or suspension pursuant to article 16(1)], the court may modify or terminate such relief [, stay or suspension] [, taking into account the interests of the creditors and other interested persons, including the debtor].

85. The article makes the consequences of articles 15, 16 and 17 subject to court-imposed conditions and allows those consequences to be modified and terminated by the court. Furthermore, the article expressly gives standing to the parties who may be affected by the

consequences of articles 15, 16 and 17 to petition the court for those consequences to be modified and terminated. Thereby the provision provides effective underpinning to the policy, impliedly pursued at various places in the Model Provisions, that all affected interests in the enacting State should be given due regard in tailoring the relief that the Model Provisions make available to foreign proceedings. The article is intended to operate in the context of the procedural system of the enacting State.

Article 19 *bis*. Actions to avoid acts detrimental to creditors

Upon recognition of a foreign proceeding, the foreign representative [is permitted] [has standing] to initiate *[refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available, according to the law of the enacting State, to the local insolvency administrator in the context of insolvency proceedings in the enacting State].*

86. The provision is drafted narrowly in that it is limited to conferring procedural standing to the foreign representative to bring such actions (to the same extent as a local insolvency administrator), in particular, the provision does not create any substantive right regarding the initiation of such action and also does not provide any conflict-of-laws solution for such actions.

87. The issue of court actions aimed at avoiding or otherwise rendering ineffective transactions by the debtor that are detrimental to creditors is of great complexity and the conditions under which such actions can be brought, or the law applicable to them, do not seem to lend themselves to harmonized solutions. However, since the right to commence such actions is essential to protect the integrity of the assets of the debtor, and is often the only realistic way to achieve such protection, it is important to ensure that such right would not be denied to a foreign representative on the sole ground that he or she has not been locally appointed.

88. It may be noted that under many national laws individual creditors have a right to bring actions to avoid or otherwise render ineffective acts detrimental to creditors. Such actions are typically governed by general provisions of law (such as the Civil Code) and are not necessarily tied to the existence of an insolvency proceeding against the debtor, and the right to bring them typically belongs to any affected creditor and not to other persons such as the person appointed to administer the debtor's assets. Such actions do not fall within the scope of article 19*bis*.

Article 20. Intervention by a foreign representative in actions in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in [individual actions] [proceedings] in which the debtor is a [claimant or defendant] [party].

89. The word "intervene" in the context of article 20 is intended to express the idea that the foreign representative has standing to appear in court and make representations in individual actions by the debtor against a third party or by a third party against the debtor. Many if not all national procedural laws contemplate cases where a party (the foreign representative in the current provision) who demonstrates a legal interest in the outcome of a dispute between two other parties may be permitted by the court to be heard in the proceedings. National procedural

systems refer to such situations by different expressions, among which the expression "intervention" is frequently used. If the enacting State uses another expression for that concept, the use of such other expression in enacting article 20 would be appropriate.

90. It should be noted that the expression "participate" in article 10 refers to a case where the foreign representative makes representations in a collective insolvency proceeding, whereas the expression "intervene" in article 20 covers a case where the foreign representative takes part in an individual action by, or against, the debtor.

CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

Article 21. Authorization of cooperation and direct communication with foreign courts and foreign representatives

(1) In matters referred to in article 1, a court referred to in article 4 shall cooperate to the maximum extent possible with foreign courts, either directly or through a *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* or a foreign representative. The court is permitted to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

(2) In matters referred to in article 1, a *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* shall, in the exercise of its functions and [subject to the supervision] [without prejudice to the supervisory functions] of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives. The *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* is permitted, in the exercise of its functions and [subject to the supervision] [without prejudice to the supervisory functions] of the court, to communicate directly with foreign courts or foreign representatives.

(3) Cooperation may be implemented by any appropriate means, including:

(a) appointment of a person or body to act at the direction of the court;

(b) communication of information by any means deemed appropriate by the court;

(c) coordination of the administration and supervision of the debtor's assets and affairs;

(d) approval or implementation by courts of agreements concerning the coordination of proceedings;

(e) [coordination of multiple proceedings regarding the same debtor] [coordination of main or non-main foreign proceedings and a proceeding in this State under *[identify laws of the enacting State relating to insolvency]* in respect of the same debtor;

(f) *[the enacting State may wish to list additional forms or examples of cooperation].*

91. Article 21 is a core element in the Model Provisions in that it is designed to overcome a widespread lack in national legislation of provisions authorizing cooperation by domestic courts with foreign courts in administration of cross-border insolvencies. Enactment of such a legislative authorization may be particularly helpful in legal systems in which the discretion given to judges to operate outside areas of express statutory authorization is limited. However, even in jurisdictions in which there is a tradition of wider judicial latitude, enactment of a legislative empowerment and framework for cooperation has proven to be useful. The ability of courts, with appropriate involvement of the parties, to communicate "directly" and to request information and assistance "directly" from foreign courts or foreign representatives is intended to avoid the use of time consuming procedures traditionally in use, such as letters rogatory. This ability is critical when the courts consider that they should act with urgency.

92. Inclusion of the reference to international cooperation between persons who, under the supervision of their respective courts, administer the insolvency proceedings reflects the important role that such persons can play in devising and implementing cooperative arrangements, within the parameters of their authority and under overall supervision of the courts.

93. In view of the importance of emphasizing the expeditious character of the process envisaged, the enacting State may find it useful to indicate expressly that the courts are authorized to forgo use of the formalities (e.g. communication via higher courts, letters rogatory or other diplomatic or consular channels) that are inconsistent with the policy behind the provision and to address requests for information or assistance directly to foreign courts or foreign representatives.

94. Paragraph (3) is suggested to be used by the enacting State to provide courts with an indicative list of the types of cooperation that are authorized by article 21. Such an indicative listing may be particularly helpful in States with limited tradition of direct cross-border judicial cooperation, and in States where judicial discretion has traditionally been limited. Any listing of forms of possible cooperation should not purport to be exhaustive, as this might inadvertently preclude certain forms of appropriate cooperation.

95. Subparagraph (f) is a slot into which the enacting State may add additional forms of possible cooperation. Those might include, for example, suspension or termination of existing proceedings in the enacting State.

CHAPTER V. CONCURRENT PROCEEDINGS

Article 22. Concurrent proceedings

(1) Upon recognition of a foreign main proceeding, the courts of this State have jurisdiction to commence a proceeding in this State against the debtor under *[identify laws of the enacting State relating to insolvency]* only if the debtor has assets in this State, and the effects of that proceeding shall be restricted to the assets of the debtor situated in the territory of this State.

(2) Recognition of a foreign insolvency proceeding is, for the purposes of commencing a proceeding in this State referred to in paragraph (1) of this article and in the absence of evidence to the contrary, proof that the debtor is insolvent.

96. As a consequence of enactment of the Model Provisions, the enacting State would have in its legislation a system for recognition of foreign insolvency proceedings. This would include a method for distinguishing between foreign "main" and "non-main" proceedings. The next question that may arise in a legislator's mind is what residual competence to commence an insolvency proceeding in the enacting State would remain once a foreign proceeding has been recognized. The question has particular significance in the case of recognition of a foreign proceeding as the "main" proceeding, which has the potential of having the most wide-reaching effects. In such cases the local "non-main" proceeding is sometimes referred to as a "secondary" proceeding. Article 22 presents the enacting State with a method of allocation of jurisdiction in cases in which a foreign main proceeding has been recognized. In such cases, commencement of an insolvency proceeding would be possible if the debtor has assets in the enacting State.

97. Enactment of paragraph (2) may have particular significance when proving insolvency as the prerequisite for the commencement of a local insolvency proceeding would be a time-consuming exercise and of little benefit bearing in mind that the debtor is already in an insolvency proceeding elsewhere and the opening of a local proceeding may be urgently needed for the protection of local creditors. Nonetheless, local criteria for showing insolvency remain operative through the proviso that evidence to the contrary would be acceptable.

Article 23. Rate of payment of creditors

Without prejudice to [secured claims] [rights in rem], a creditor who has received part payment in respect of its claim in an insolvency proceeding commenced in another State may not receive a payment for the same claim in a proceeding commenced in this State under *[identify laws of the enacting State relating to insolvency]* with regard to the same debtor in this State, so long as the payment to the other creditors of the same class for their claims in the proceeding commenced in this State is proportionately less than the payment the creditor has already received.

98. The rule set forth in article 23, sometimes referred to as the "hotchpot" rule, is widely viewed as a useful safeguard in a legal regime for coordination and cooperation in the administration of cross-border insolvency proceedings. It is intended to ensure that a creditor,

by participating in proceedings in more than one jurisdiction, does not receive a greater proportion of repayment of claims than that received by other creditors of the same class.

V. ASSISTANCE FROM THE UNCITRAL SECRETARIAT

(a) Assistance in drafting legislation

99. The UNCITRAL Secretariat may assist States with technical consultations for the preparation of legislation based on the Model Provisions. Further information may be obtained from: the UNCITRAL Secretariat, Vienna International Centre, P.O. Box 500, A-1400 Vienna, Austria, fax (43-1) 21345-5813, electronic mail: uncitral@unov.un.or.at, [new fax number to be introduced during the second half of 1997: (43-1) 26060-5813].

(b) Information on interpretation of legislation based on Model Provisions

100. Once enacted, the Model Provisions will be included in the system for collecting and disseminating information on case law relating to the Conventions and Model Laws that have emanated from the work of the Commission (Case Law on UNCITRAL Texts (CLOUT)). The purpose of the system is to promote international awareness of the legal texts formulated by the Commission and to facilitate uniform interpretation and application of them. The Secretariat publishes, in the six languages of the United Nations, abstracts of decisions and makes available, in the original language, the decisions on the basis of which the abstracts were prepared. The system is explained in document A/CN.9/SER.C/GUIDE/1, available from the Secretariat. Currently, CLOUT covers the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol of 1980, United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), UNCITRAL Model Law on International Commercial Arbitration (1985) and the Hamburg Rules.

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[It is suggested to include the following material at an appropriate place in the publication in which the Model Provisions and this Guide will be published.]

The Model Provisions were adopted by the United Nations Commission on International Trade Law (UNCITRAL) [at its thirtieth session (Vienna, 12-30 May 1997).] [Action by the General Assembly].

In addition to the 36 member States of the Commission, representatives of many other States and of a number of international intergovernmental and non-governmental organizations participated in the deliberations. The project, initiated in close cooperation with the International Association of Insolvency Practitioners (INSOL), benefitted from suggestions and expert advice from practitioners from many countries such as administrators of insolvent debtors' assets, attorneys, judges and officials concerned with insolvency matters. Consultations were facilitated, apart from the International Association of Insolvency Practitioners (INSOL), by Committee J (Insolvency) of the Section on Business Law of the International Bar Association (IBA) and the Commission on International Bankruptcy Law of the International Association of Lawyers (Union Internationale des Avocats (UIA)).

After a preliminary discussion on the project by the Commission in 1993[1], and prior to the decision to undertake work on cross-border insolvency, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, Austria, 17-19 April 1994), involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders. The suggestion arising from the Colloquium was that work by the Commission should, at least at the initial stage, have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.[2] Subsequently, an international meeting of judges was held specifically to elicit their views as to work by the Commission in that area (UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency, Toronto, Canada, 22-23 March 1995). The view of the participating judges and government officials was that it would be worthwhile for the Commission to provide a legislative framework for judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings[3].

The decision to develop a legal instrument relating to cross-border insolvency was taken at the twenty-eighth session of the Commission (Vienna, 2-26 May 1995)[4]. The work was assigned to the Working Group on Insolvency Law, one of the Commission's inter-

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[1] Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session (Vienna, 5-23 July 1993), Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17) (reproduced in UNCITRAL Yearbook, vol. XXIV: 1993, part one, A), paras. 302-306.

[2] The report on the Colloquium was published as document A/CN.9/398 (reproduced in UNCITRAL Yearbook, vol. XXV: 1994, part two, V, B); the report was considered at the twenty-seventh session of the Commission (New York, 31 May - 17 June 1994); the considerations are reflected in Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17) (UNCITRAL Yearbook, vol. XXV: 1994, part one, A), paras. 215-222.

[3] The report on the Judicial Colloquium was published as document A/CN.9/413 (reproduced in UNCITRAL Yearbook, vol. XXVI: 1995, part two, IV, A); the report was considered at the twenty-eighth session of the Commission (Vienna, 2-26 May 1995); the considerations are reflected in Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17) (UNCITRAL Yearbook, vol. XXVI: 1995, part one, A), paras. 382-393.

[4] Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17) (UNCITRAL Yearbook, vol. XXVI: 1995, part one, A), paras. 392 and 393.

governmental subsidiary bodies. The Working Group devoted four two-week sessions to the work on the project.[5]

After the last of those Working Group sessions, the Second UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency was held (22-23 March 1997) in conjunction with the 5th World Congress of the International Association of Insolvency Practitioners (INSOL) (New Orleans, United States of America, 23-26 March 1997). The Colloquium considered the draft Model Provisions as they were prepared by the Working Group. The participants, mostly judges and government officials, were generally supportive of the draft, expressed suggestions on the substance of several provisions, and considered that the Model Provisions, when enacted, would constitute a major improvement in dealing with cross-border insolvency cases.

Further Colloquia involving judges and other practitioners are planned to be held to consider the experience with the Model Provisions.

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[5] Report of the eighteenth session (Vienna, 30 October - 10 November 1995): document A/CN.9/419 (UNCITRAL Yearbook, vol. XXVII: 1996, part two); report of the nineteenth session (New York, 1-12 April 1996): document A/CN.9/422 (UNCITRAL Yearbook, vol. XXVII: 1996, part two); report of the twentieth session (Vienna, 7-18 October 1996): document A/CN.9/433 (UNCITRAL Yearbook, vol. XXVIII: 1997, part two); report of the twenty-first session (New York, 20-31 January 1997): document A/CN.9/435 (UNCITRAL Yearbook, vol. XXVIII: 1997, part two).